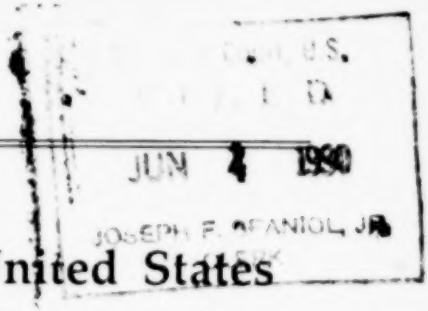
No. 89-1080



In The

Supreme Court of the United States

October Term, 1989

THE BOARD OF EDUCATION OF OKLAHOMA CITY PUBLIC SCHOOLS, INDEPENDENT SCHOOL DISTRICT NO. 89, OKLAHOMA COUNTY, OKLAHOMA,

Petitioner,

v.

ROBERT L. DOWELL, *et al.*,

Respondents.

On Appeal From The United States Court Of Appeals For The Tenth Circuit

BRIEF *AMICUS CURIAE* OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF THE BOARD OF EDUCATION OF OKLAHOMA CITY PUBLIC SCHOOLS

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BRIEF *AMICUS CURIAE* OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF THE BOARD OF EDUCATION OF OKLAHOMA CITY PUBLIC SCHOOLS

Mountain States Legal Foundation (MSLF) respectfully submits this brief *amicus curiae* on behalf of its members.[1]

[1] MSLF has obtained the written consent of all parties to this action. The letters communicating such written consent have been filed with the Clerk of the Court.

INTEREST OF *AMICUS CURIAE*

MSLF is a nonprofit, membership, public interest law foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited government and the free enterprise system. MSLF has an extensive background and expertise in civil rights litigation.[2]

MSLF and its members oppose the involvement of the federal judiciary in the control and management of the nation's public schools except when absolutely necessary to ensure compliance with the Constitutional mandates of equal protection. However, such involvement, by its very nature, and consistent with well-established principles of common law, must be temporary and endure only so long as necessary to achieve that which is required by our Constitution – equal protection under the law. MSLF and its members believe once that goal has

[2] MSLF was counsel of record in both *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), and *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987). In addition, MSLF has participated as counsel or *amicus* in many cases defining the scope and application of the Civil Rights Acts and the Fourteenth Amendment. *E.g., Marsh v. Board of Education*, 581 F. Supp. 614 (E.D. Mich. 1984), *aff'd*, 762 F.2d 1009 (6th Cir. 1985), *vacated and remanded*, 476 U.S. 1137 (1986); *NAACP v. City of Detroit*, 591 F. Supp. 1194 (E.D. Mich. 1984), *reversed and remanded*, 821 F.2d 328 (6th Cir. 1987); *AFSCME v. State of Washington*, 578 F. Supp. 846 (W.D. Wash. 1983), *rev'd*, 770 F.2d 1401 (9th Cir. 1985), *reh'g denied*, 813 F.2d 1034 (9th Cir. 1987); *City of Richmond v. J.A. Croson Company*, 109 S.Ct. 706, 735 (1989).

been achieved, management and control of the public schools must be returned to the people.

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

Amicus curiae adopts the statement of the case and the statement of the facts as set out in Petitioner's Brief.

SUMMARY OF ARGUMENT

The Tenth Circuit Court of Appeals, alone among the Circuits, has refused to follow well-established precedent in giving effect to an express determination that a school district has become "unitary." In addition, the Tenth Circuit has failed to guide – and has thus compounded the errors of – one of its lower courts in ascertaining the constituent parts and nature of unitariness, the effects of remedial decrees, and, finally, the limitations of judicial oversight.[3]

In the instant case, the issue is the nature of a school district's continuing obligations once the original remedial order has been executed and the district has been deemed "unitary." In the Denver case the issue is twofold: first, the nature of a school district's continuing

[3] *Wilfred Keyes, et al. and Congress of Hispanic Educators, et al. v. School District No. 1, Denver, Colorado, et al.*, Nos. 85-2814 and 87-2634 on appeal from United States Court of Appeals for the Tenth Circuit, (January 30, 1990), hereinafter "the Denver case."

obligations once the original remedial order regarding student assignments has been dissolved, and second, the ability of the District Court to withhold a finding of "unitary" and instead impose a new "interim" decree which maintains, in perpetuity, judicial control.

Together these two cases reveal a misunderstanding of the law of desegregation, that is, the need for adherence to centuries old principles of common law. More simply: a wrong and its remedy ascertained and fashioned in a court of law. The law of desegregation is not *sui generis*, but must lie within well-established principles of common law.

Together these two cases define one of the most important issues facing this Honorable Court: How does a public school district achieve "unitary" status and end judicial control of the education of its young?

This Honorable Court has before it, in the instant case, and with the pendency of the Denver and Topeka cases from the same circuit, a unique opportunity to articulate a precise definition of "unitary" and to synthesize the generalities in the decisions of this Honorable Court with the refinements accomplished by enlightened Circuit courts using well-established principles of common law.

ARGUMENT

I. THE DECISION OF THE TENTH CIRCUIT COURT OF APPEALS IN THE INSTANT CASE – THAT A SCHOOL DISTRICT ONCE DETERMINED TO BE "UNITARY" CONTINUES UNDER THE CONTROL OF THE FEDERAL JUDICIARY – IS INCONSISTENT WITH THE HOLDINGS OF THIS HONORABLE COURT, IS IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS, IS CLEARLY ERRONEOUS AND MUST BE REVERSED.

The decision of the Tenth Circuit Court of Appeals in the instant case – that the Oklahoma City Public Schools, having been found to be "unitary," nevertheless must continue within the control of the federal judiciary – is inconsistent with the holdings of this Honorable Court, is in conflict with the decisions of other Circuits, is clearly erroneous, and must be reversed.

In *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 6 (1971), this Honorable Court granted *certiorari* to assist schools and courts struggling under a mandate to dismantle dual school systems, by "defining in more precise terms . . . the scope of the duty of school authorities and district courts in implementing *Brown I*." As a result of that decision, numerous school districts accomplished their affirmative duty to desegregate and achieve unitary status.

In *Riddick v. School Board of City of Norfolk*, 784 F.2d 521 (4th Cir. 1986), *cert. denied*, 107 S.Ct. 420 (1986), the Fourth Circuit Court of Appeals refused to reimpose court authority over the school district, since the district had been found to be unitary, and since the subsequent changes in the school system had been prompted by

demographic changes. The Fourth Circuit declared that "once the goal of a unitary system is achieved, the district court's role ends," and concluded that the previous finding that the school district was "unitary" "returned control of the city's schools to the school board." *Id.*, at 535, 538.

The Fourth Circuit's decision was founded upon the *de facto/de jure* distinction recognized by the Supreme Court in *Keyes v. School District No. 1*, 413 U.S. 189 (1973). The Fourth Circuit held that judicial control of a school district cannot "continue in perpetuity to prevent resegregation absent a showing of intent to discriminate." *Riddick*, 784 F.2d at 534.

In the instant case, the Tenth Circuit was cognizant of the *Riddick* decision, but chose not to distinguish it. The Tenth Circuit concluded that *Riddick* "seems to treat a district court order terminating supervision as an order dissolving a mandated integration plan, despite the absence of a specific order to that effect." *Dowell v. Board of Education of Oklahoma City Public Schools*, 795 F.2d 1516, 1520 n.3 (10th Cir. 1986). Concluded the Tenth Circuit, "[t]he Fourth Circuit has taken a different view with which we cannot agree." *Id.*

The Fifth Circuit Court of Appeals examined this conflict between the Fourth and the Tenth Circuits and concluded:

> The difficulty with *Dowell's* approach is that it denies meaning to unitariness by failing ever to end judicial superintendence of the schools.
>
> * * *
>
> We see *Dowell's* effort to declare a school system to be unitary while retaining jurisdiction as an illusion that denies the essence of unitariness.
>
> * * *
>
> In sum, the idea that a school district can be declared unitary and yet be answerable to the federal courts for failure to abide by desegregation plans, regardless of segregative purpose, is at war with itself.

United States v. Overton, 834 F.2d 1171, 1175, 1176, 1177 (5th Cir. 1987). Other circuits have ruled similarly:

> Although the [Supreme] Court has produced no formula for recognizing a unitary school system, the one thing certain about unitariness is its consequences: the mandatory devolution of power to local authorities.

Morgan v. Nucci, 831 F.2d 313, 318 (1st Cir. 1987).

> Retention of jurisdiction where there is no longer a demonstrated need to monitor compliance may defeat important governmental and personal interests . . . . There is no warrant for retaining further jurisdiction in the case, and the district court should enter an order relinquishing all further jurisdiction.

Spangler v. Pasadena Board of Education, 611 F.2d 1239, 1241 (9th Cir. 1979) (Kennedy, J., concurring).

In *Overton*, the Fifth Circuit held:

> [C]ontinuing limits imposed as a remedy after the wrong is righted effectively changes the constitutional measure of the wrong itself; it transposes the dictates of the remedy for the dictates of the constitution and, of course, they are not interchangeable. Stated another way, the constitutional violation is purposeful separation of

> races in public education. The mix that would have occurred but for the racism is a judicially created hypothetical. We have insisted upon matching that model of a unitary desegregated status as a remedy for the wrong. Refusing, after the match, to allow a school district to vary from that model unless it proves its "non-segregative" purpose confuses wrong and remedy.

834 F.2d at 1176-77. Further, "attaining unitary status . . . means that a school board is free to act without federal supervision so long as the board does not purposefully discriminate; only intentional discrimination violates the constitution." *Id.*, at 1175.

Thus the approach of the Tenth Circuit to the Oklahoma City situation overlooks the importance of "local" control, *Milliken v. Bradley*, 433 U.S. 267, 280-82 (1977), and fails to recognize that the remedy is designed "to repair the denial of a constitutional right," and to operate only during the "interim period" when remedial adjustments are being made to eliminate the dual school system. *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 16, 28 (1971).[4]

The Tenth Circuit Court of Appeals – in requiring the District Court to reestablish control over the unitary

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[4] As to the Denver situation, "neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system." *Swann, supra*, 402 U.S. at 31-32. "The clear import . . . from *Swann* is that desegregation, in the sense of dismantling a dual school system, does not require any particular racial balance in each 'school, grade or classroom.' " *Milliken I, supra*, 418 U.S. at 740-41.

school system in Oklahoma City, and in permitting the District Court to retain control over what appears to be a unitary school system in Denver – is in conflict not just with the decisions of other Courts of Appeals but with the fundamental decisions of this Honorable Court as well.

What these decisions clearly demonstrate is that every Court of Appeals ruling on the issue, save the Tenth Circuit, has held that once a school district has been found to be "unitary," it is always "unitary." Nothing, except demonstration of an "intent" to discriminate, will permit the federal courts to reimmerse themselves in the business of operating school districts. The instant decision of the Court of Appeals for the Tenth Circuit is clearly erroneous and should be reversed.

However, as much as such a ruling would narrowly resolve the case now before this Honorable Court, that ruling will not provide the critically needed relief from the inequities of improper federal court involvement in the management of school districts. It will not provide that relief because any Court of Appeals applying such a narrow ruling will find little authority for reversing the recalcitrant, if not wilful, fact-finder who refuses to pronounce a school district "unitary."[5]

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[5] That is exactly the refusal which so vexes the people of Denver. In *Wilfred Keyes, et al. and Congress of Hispanic Educators, et al. v. School District No. 1, Denver, Colorado, et al.*, 609 F. Supp. 1491 (D.C. Colo. 1985), the District Court declined to pronounce the Denver Public Schools "unitary" even though the Denver School Board had met every requirement established for it nearly 20 years before. Instead the District Court imposed a new injunction which it deemed "interim."

II. TRADITIONAL PRINCIPLES OF COMMON LAW PROVIDE BOTH THE MEANS OF DEFINING AND THE ALTERNATIVE TO DEFINING THE "UNITARY" SCHOOL DISTRICT AND ENDING DECADES OF JUDICIAL CONTROL OF THE NATION'S SCHOOL SYSTEMS.

A. Defining The "Unitary" School Districts Vexes Not Simply The Courts But The People Of The Districts Now Operating Under Judicial Control Of Their Schools.

A narrow ruling by this Honorable Court in the matter now before it poses other problems in addition to the not-so-hypothetical District Court for which proof of "unitariness" is well-nigh impossible. For regardless of the willingness of the fact-finder to conclude that a school district has met its constitutional obligations, district and appellate courts will continue to be confronted by the definitional difficulties of a word which this Honorable Court has yet to define and which may well be impossible to effectively define.[6]

Even if this Honorable Court were willing to describe what it means by "unitary," such subtle distinctions as may be necessary in such a definition may lead to further confusion. While trial-and-error applications of the decisions of this Honorable Court are the price the nation

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[6] The conclusion of Justice Potter Stewart on the difficulties of defining pornography comes instantly to mind: "I shall not today attempt further to define [hard-core pornography] . . . . But I know it when I see it. . . ." *Jacobellis v. Ohio*, 378 U.S. 184 at 197 (1964). How little different is the definition of "unitary" as that which "has no vestiges of a dual system." Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1707.

must pay for a federal judiciary which asks the involvement of this Honorable Court only when necessary to provide the requisite guidance in this area of the law, that price will be paid by millions of Americans – of all races – who are denied the control of their children's education.

In addition, a narrow holding by this Honorable Court will ensure continued confusion for years. This Honorable Court will be asked to resolve a progression of cases – beginning with that of the Denver Public Schools – which have never been pronounced to be "unitary" although meeting every possible element of such a definition.

Pronouncement, by this Honorable Court, of a precise definition of the "unitary" school district – one which lends itself to universal application, as a matter of law, by each reviewing Court of Appeals – is sought in the instant case, and is necessary, according to many thoughtful commentators. However, this Honorable Court may both effectively define the "unitary" school system and avoid the conundrum of defining "unitary" by the application of traditional principles of common law.

B. Traditional Principles Of Common Law Provide The Means Of Defining The "Unitary" School District – There Is No Need For A "New" And Policy-Driven Body Of Law.

The clearly erroneous application, by the Court of Appeals for the Tenth Circuit, of anti-trust law to the instant case reflects the degree to which the courts have struggled to isolate the body of law which will provide

guidance to desegregation cases. That search – in large part driven by policy – has led some to assert that a new body of law needs to be developed, a body of law devoted exclusively to achieving equality in our nation's schools.

Unfortunately the development of a "new" body of law permits the creating court to write on a *tabula rasa*, unconstrained by previous rulings of this Honorable Court in areas of the law deemed "inapplicable" to desegregation cases. Obviously the resort to the development of a "new" body of law is a refuge sought by those who disagree, on policy grounds, with where existing law requires the court to go. As a result, a court can travel practically anywhere its sense of justice takes it, since there are no charted waters in an "evolving" area of the law.[7] It is for these reasons that a return to the traditional principles of common law is so essential.[8]

C. Application of Traditional Principles of Common Law: *Res Judicata.*

Once a court finds liability and Constitutional violation, *i.e.*, an intentionally segregated school system, that

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[7] Obviously lost in all of this is Justice Oliver Wendell Holmes' admonition that his role was "to apply the law" not to "do justice." R. Bork, *The Tempting of America* (1990) at page 6.

[8] A thorough and well-reasoned analysis of the nature and elements of the desegregation litigation process, together with powerfully persuasive conclusions appeared in the Louisiana Law Review in 1989, and was relied upon in the preparation of this Brief *Amicus Curiae*. Beard, H., The Role of *Res Judicata* in Recognizing Unitary Status and Terminating Desegregation Litigation: A Response to the Structural Injunction, 49 La. L. Rev. 1989, hereinafter "Beard."

court must issue a remedial order designed to eradicate "root and branch"[9] the offending system and replace it with one not constitutionally offensive. However, once that order has been fully implemented and fully complied with by the local school board, the constitutional breaches must be deemed to have been corrected and the school system declared unitary. Rule 60(b) of the Federal Rules of Civil Procedure requires no less.

As one scholar has noted:

> The critical point . . . is that *res judicata* applies to the desegregation decree. Logically and necessarily flowing from this conclusion is the preclusion of a continuing and flexible modification of the decree, the operation of the "satisfaction" clause of Rule 60(b), and the holding in *Board of Education of Pasadena City Schools v. Spangler*. From this conclusion, the corollary that the finding of unitary status likewise is *res judicata* is a logical result. If *res judicata* did not apply, the desegregation decree could be modified at will, and rendered incapable of satisfaction. Hence, the dicta of *Swann v. Charlotte-Mecklenburg Board of Education*, and the holding of *Spangler I* would be incompatible with the fabric of the law.[10]

Just as in any other litigation, a final desegregation order contains findings of fact, conclusions of law – which identify the intentionally discriminatory conduct causing segregation and any vestiges of prior segregation

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[9] *Green v. County School Board of New Kent County*, 391 U.S. 430, 437 (1969).

[10] Beard, at 1241, notes omitted.

– and remedies, whether isolated or systemic.[11] The desegregation plan must entirely dismantle the dual school system and ensure a unitary school system. The court must assure that the plan "promises realistically to work, and promises realistically to work *now*."[12] In so doing, the court must do so with specificity and in sufficient detail:

> Rule 65(d) of the Federal Rules of Civil Procedure further requires that injunctions shall state their terms specifically and in reasonable detail. This rule must, of course, apply to desegregation orders as it would to any injunction. Possibly most important, however, and consistent with the commands of both equity and Rule 65(d), the remedy must be specifically tailored to the findings of constitutional violation.[13]

Res judicata applies not only to the final desegregation order but also to the determination of unitary status:

> Once the final desegregation order is formulated and approved, it has the effect of a final judgment under the doctrine of *res judicata*. The doctrine of *res judicata* teaches that "when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are *thereafter bound not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.*" *Res judicata* is not a technical rule, but a fundamental rule of repose for both society and

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[11] Beard, at 1244.

[12] *Green, supra* 391 U.S. at 439. (Emphasis in original.) *See, Swann, supra* 402 U.S. at 13.

[13] Beard, at 1246. Notes omitted.

litigants. "[T]he doctrine of *res judicata* is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts." This language, used by the Supreme Court half a century ago, is even more compelling in view of today's crowded dockets.

The doctrine of *res judicata* applies to injunctions. This doctrine is consistent with, if not required by, the merger of law and equity accomplished by the Federal Rules of Civil Procedure. The doctrine of *res judicata* governs litigation brought under *Section 1983*, the statute under which almost all desegregation suits are authorized. The effect of *res judicata* extends to the findings of liability, the necessity of the remedy, the balancing of equitable interests, and the ultimate sufficiency of the decree to correct the violations. This is so because all of these issues are necessary parts of the decision whether to issue the injunction.[14]

* * *

> The doctrine of *res judicata* applies only where a final judgment adjudicating the rights of the parties has been entered. A judgment is final for purposes of *res judicata* and its corollaries when the court order adjudicates all of the rights and liabilities of all the parties. An injunction is such a final adjudication.[15]

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[14] Beard, at 1251, 1252, 1253 (notes omitted. Emphasis added.)

[15] *Id.* at 1254, 1255.

Beard's analysis of the application of *res judicata* to desegregation cases provides a helpful construct:

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While a court possesses the capability of modifying certain desegregation orders pursuant to Rule 60(b) of the

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When a school district has been involved in desegregation litigation in the past, the previous proceedings are part of this historical inquiry. Assume that in the past litigation, the court determined that there was official, intentional discrimination. No one appears to want *that* decision re-examined or relitigated. Subject to Rule 60(b), it is *res judicata*, and the determination is binding on the subsequent inquiry. Where the courts made that previous determination, the courts will have determined, secondly, what injuries the plaintiffs sustained as a result of the identified intentional discrimination. Those injuries may include current injuries and also conditions that continue to cause injuries in the future ("vestiges of segregation"). This second determination is also *res judicata*, though many appear to want *this* determination re-examined and to add more injuries and more existing conditions to its list.

Thirdly, the court will have determined what conduct was necessary to "remedy" the situation, to put the plaintiff in the place where the plaintiff would have been had the intentional discrimination not occurred ("remedy"). This may involve a payment of money ("damages"), or it may involve an order not to do certain specific and described acts or to do certain equally specified and described acts ("injunction" or "desegregation plan"). This is again *res judicata*, but whether this determination may be re-examined and relitigated is very much the question at bar.

The court may or may not have made a fourth determination: whether the conduct required by the third determination ("remedy") has been implemented. Where this determination has already been

(Continued on following page)

Federal Rules of Civil Procedure under certain prescribed circumstances, particularly since all equitable decrees are

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made, it is also *res judicata*. Whether this determination may be relitigated has not been widely debated because its significance depends almost exclusively on the binding nature of the third determination.

If the court's second determination ("vestiges") is *res judicata*, then injuries that the court had not previously found to have resulted from the intentional official discrimination cannot be subsequently examined (except under Rule 60(b)) as having been possibly caused by that discriminatory conduct. A succeeding court should not then find these conditions to be constitutionally offensive unless it independently finds them to have been caused by intentional official discrimination.

If the court's third determination ("remedy") is *res judicata*, then only the conduct required by that determination – the payment of money or the doing or avoiding of certain acts – was necessary to correct the identified injuries, again, except as modified under Rule 60(b). And, as a logically necessary corollary, the performance of that conduct did in fact correct the previously identified injuries and satisfy the previously imposed obligation.

If the injuries found to have resulted from the previously identified intentional discrimination have been subsequently corrected, then the current state of affairs cannot result from the intentional discrimination previously identified, and the examining court is back to square one.

A *de novo* review of the unitary status of a school district logically denies the operation of *res judicata*

(Continued on following page)

modifiable, as are all judgments in law or equity under the Federal Rules of Civil Procedure, the ability of a District Court, after sixteen years, to characterize its continued oversight as an "interim decree," is highly suspect:[16]

> A district court may not preclude the effects of "finality" by declining to enter a "final" decree and labeling its order as "provisional" or "interim," or by retaining the power to modify without the showing required by Rule 60(b). The "inherent limitation upon federal judicial authority" emphasized by the Court in *Swann, Spangler I, Milliken I,* and other Supreme Court decisions, cannot be evaded merely by a court declaring that it retains power to modify its orders from time to time as it deems circumstances might require. Additionally, such provisions cannot thwart the mandate of *Green* that the time for deliberate speed had ended and that orders must "promise realistically to work, and . . . to work *now*." An order that promises realistically to work *"now"* necessarily precludes an order that a court deems insufficient and intends to modify in the future. A plan which the court knows may require modification is not

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in the second and third determination ("remedy"), and often re-examines the second determination ("vestiges").

Beard, at 1282-83.

[16] Memorandum Opinion and Order of the United States District Court for the District of Colorado, October 6, 1987. *Wilfred Keyes, et al. and Congress of Hispanic Educators, et al. v. School District No. 1, Denver, Colorado, et al.*, Nos. 85-2814 and 87-2634 on appeal from United States Court of Appeal for the Tenth Circuit, (January 30, 1990).

> a plan that honestly and realistically promises to work – now or at any other time.[17]

The limited authority of a district court to modify its outstanding injunctive decrees "is not a substitute for an appeal. It does not allow relitigation of issues that have been resolved by the judgment."[18] This Honorable Court has made very clear: "The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions at its making. We are not at liberty to reverse under the guise of readjusting."[19]

The decision on whether or not a school system has achieved "unitary" status might best be answered by reference to traditional principles of common law. For example, the first clause of Rule 60(b)(5) of the Federal Rules of Civil Procedure provides:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:
>
> * * *
>
> (5) the judgment has been satisfied, released, or discharged . . . .

Thus, when the defendants have fully and faithfully implemented all aspects of the final order approved and modified by the court, the school district has achieved "unitary" status and should be so declared.

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[17] Beard, at 1257 (footnotes omitted).

[18] 11 Moore's Federal Practice and Procedure § 2863, at 206.

[19] *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932).

The traditional doctrine of *res judicata* and the satisfaction of judgment clause of rule 60(b)(5), has been utilized in areas outside desegregation law, particularly in environmental law.[20] In addition, these principles have been utilized by this Honorable Court in *Pasadena Board of Education v. Spangler*,[21] as well as by the Courts of Appeals for the First and Ninth Circuits.[22]

D. Summary

Desegregation cases want not for the development of new legal principles to guide the Courts of Appeals and District Courts, but merely for the application of traditional principles of common law to the desegregation actions brought before them. Defining the school district as "unitary" is problematic at best, but is less so when defined in the context of conventional litigation following traditional common law principles.

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[20] *Environmental Defense Fund, Inc. v. Hoffman*, 566 F.2d 1060 (8th Cir. 1977); *Environmental Defense Fund, Inc. v. Corps of Engineers of the United States Army*, 342 F. Supp. 1211, 1218 (E.D. Ariz.), *aff'd*, 470 F.2d 289 (8th Cir. 1972), *cert. denied*, 412 U.S. 931 (1973); *Sierra Club v. Mason*, 365 F. Supp. 47 (D. Conn. 1973); and *Sierra Club v. U.S. Army Corps of Engineers*, 609 F. Supp. 1052 (S.D.N.Y. 1985).

[21] 427 U.S. 424 (1976).

[22] *Spangler II*, 611 F.2d 1242 (9th Cir. 1979) and *Morgan v. Nucci*, 831 F.2d 313 (1st Cir. 1987).

III. FAILURE TO APPLY TRADITIONAL PRINCIPLES OF COMMON LAW TO THE DENVER PUBLIC SCHOOLS HAS CONDEMNED THE PEOPLE OF DENVER TO TWENTY YEARS OF CONTROL OF THEIR SCHOOLS BY THE FEDERAL COURTS.

The need for this Honorable Court to adopt an expansive ruling in the instant case – in order to resolve a highly uncertain and controversial area of the law – is best revealed by examining the history of litigation regarding the Denver Public Schools.

For 20 years the Denver Public Schools have been under the control, not of the people of Denver and their elected representatives on the Denver School Board, but of the federal judiciary. Notwithstanding the fact that the Denver Public Schools have done everything asked of them – and the fact that Denver Public Schools are among the most integrated of major public school systems[23] – the District Court has declined to pronounce the Denver Public Schools to be "unitary" and in fact, has maintained permanent control of the Denver Public Schools.

For 20 years the agony of court management of the Denver Public Schools and its devastating impacts upon the people of Denver – of all races – has been played out in the local media. A sampling of headlines gives but a

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[23] F. Welch and A. Light, *New Evidence On School Desegregation*, 78-82 (Table A-2 (U.S. Gov't Printing Office, 1987)).

Rocky Mountain News, Jan. 15, 1989, at 7, col. 1 describing findings of University Chicago research.

hint of the struggle, soul searching, pain, outrage, experimentation, expense, fear, hope, frustration and exasperation experienced by the citizens of Denver. Of particular poignance is the notice dated October 25, 1985, of the 20th anniversary observance of the original plaintiffs, the children of whom are long gone from the Denver Public School System.

Branscombe, *Integration Blamed For 'White Noose'*, Denver Post, May 25, 1975, at 1A, col. 1.

Few Favor Busing, Poll Finds, Denver Post, June 16, 1975.

Cox, *Suburbs Must Integrate Or Denver Cannot, Expert Says*, Denver Post, Jan. 1, 1981, at 1, col. 1.

Branscombe, *Bradford, Public Opinion Against Busing Growing*, Denver Post, Apr. 25, 1981, at 24, col. 1.

Branscombe, *Residential Integration Called Solution To School Integration*, Denver Post, Mar. 14, 1982, at 1, col. 1.

Branscombe, *Denver Public Schools May Push Mixed Housing*, Denver Post, Nov. 7, 1982, at 2, col. 1.

Branscombe, *New Segregation Plan Unveiled*, Denver Post, Mar. 13, 1983, at 1B, col. 1.

Branscombe, *Housing Sales Touted As Aid In Integration*, Denver Post, May 13, 1983, at 5B, col. 1.

Bingham, *Panel Of Blacks To Scrutinize School Busing*, Denver Post, Nov. 16, 1984, at 1A, col. 5.

Weaver, *Busing Triggered White Flight? Truism Being Debunked By Experts*, Denver Post, Mar. 14, 1985, at 1E, col. 6.

Enda, *Cost of Busing Fight Raises Ire*, Rocky Mountain News, May 1, 1985, at 6, col 1.

School Desegregation: A Settlement Near?, Denver Post, June 10, 1985, at 1A, col. 16.

Bingham, *Denver Public Schools Drafts Bold Goals To End Integration Suit*, Denver Post, June 13, 1985, at 1A, col. 1.

Bingham, *Group Notes 20th Anniversary of Denver Desegregation Suit*, Denver Post, Oct. 25, 1985, at 1B, col. 1.

Quality of Education, Not Integration, Concerns Denver Hispanics, Denver Post, Dec. 8, 1985, at 1C, col. 1.

Bingham, *Public Housing A Key Factor in School Segregation*, Denver Post, Jan. 1, 1986, at 3B, col. 1.

Bingham, *Desegregation Suit Legal Fees Soaring*, Denver Post, Jan. 26, 1986, at 1B, col. 5.

Bingham, *Housing Plans Raise Desegregation Worry*, Denver Post, June 21, 1986, at 3B, col. 3.

Flynn, *Integrated Housing Urged To End Busing*, Rocky Mountain News, Feb. 26, 1987, at 34, col. 2.

Schools Set Rules To Curb Racism, Denver Post, Apr. 4, 1987.

Bingham, *City Plan: Forget Busing Integrate Neighborhood Schools*, Denver Post, Nov. 6, 1987, at 2A, col. 1.

Weiss, *Housing Authority Shopping South*, Rocky Mountain News, Feb. 27, 1989, at 1, col. 6.

Soergel, *Schools, White Flight Still Shape Denver*, Rocky Mountain News, Mar. 12, 1989, at 34, col. 1.

Bingham, *Neighborhood Changes Merit End To Busing, Parents Say*, Denver Post, Apr. 7, 1989, at 4B, col. 1.

CONCLUSION

From the earliest days of the Republic, management of the public schools has been exclusively local. It is education of our children that strikes closest to home. After all, it is our children we are entrusting to this particular function of government. It is the future leaders of our community and nation who will emerge from our schools. And it is the taxes on our homes and properties that pay for those schools.

As was noted by the Ninth Circuit in *Spangler v. Pasadena City Board of Education*, "The Displacement of local government by a federal court is presumed to be temporary."[24] As Judge (now Justice) Kennedy concluded, "when a court ordered remedy has accomplished its purpose, jurisdiction should terminate . . . [since] [f]urther delay in returning full responsibility for administration to the school board is unjustified."[25]

This Honorable Court must end the uncertainty, not only for the Oklahoma City Public Schools, but also the Denver Public Schools and all other public school systems similarly situated which – having met every demand made of them, having fulfilled every requirement of the litigation through which they have passed – are, unlike other similarly situated litigants, still under the control of the federal judiciary.

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[24] *Spangler, supra* at 1241.

[25] *Id.* at 1242 and 1244.

Dated this 1st day June 1990.

Respectfully submitted,

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